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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 DANIEL C. JOHNSON,

9 Petitioner,

10 v.

11 RON FRAKER,

12 Respondent.

CASE NO. C10-5090BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DENYING CERTIFICATE OF
APPEALABILITY

13 This matter comes before the Court on the Report and Recommendation (“R&R”)
14 of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 22), and
15 Petitioner Daniel C. Johnson’s (“Johnson”) Objections to the Report and
16 Recommendation (Dkt. 23).

17 **I. PROCEDURAL AND FACTUAL HISTORY**

18 On February 4, 2010, Johnson filed a petition for writ of habeas corpus under 28
19 U.S.C. § 2254 challenging his 2006 state court convictions for first degree murder, two
20 counts of first degree assault, and one count of first degree burglary, each with a firearm
21 sentencing enhancement. Dkt. 1. On November 10, 2011, the magistrate judge issued an
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1 R&R recommending that the petition be dismissed with prejudice, and that the Court not
2 issue a certificate of appealability. Dkt. 22 at 36.

3 On November 23, 2011, Johnson filed objections to the R&R. Dkt. 23. Johnson
4 argues that the Court should reject the magistrate judge's findings for four reasons. *Id.*
5 First, he reiterates his previous assertion that the Washington Court of Appeals denied his
6 motion to recall the mandate, which violated his constitutional right to due process and
7 his right to exhaust state remedies. *Id.* at 1. Johnson contends that the Washington Court
8 of Appeals issued a mandate terminating review without first serving him with a copy of
9 its ruling on his motion to reconsider. He claims that when the appellate court issued a
10 mandate affirming his conviction, he did not receive a copy of the order while
11 incarcerated. This, Johnson argues, caused a delay in his filing a motion to review, which
12 violated his constitutional rights by denying his motion to recall that court's mandate. *Id.*
13 at 2.

14 Second, Johnson claims that the trial transcripts were so incomplete that the
15 appellate court could not have properly assessed his claim of ineffective assistance of
16 counsel. *Id.* at 2-3. Johnson's final claims are that he received ineffective assistance of
17 counsel during both the trial and the appellate review of his case. *Id.* at 5.

18 Under Rule 8(b) of the rules governing habeas petitions brought under § 2254, the
19 district court judge "must determine de novo any proposed finding or recommendation to
20 which objection is made" and "may accept, reject, or modify any proposed finding or
21 recommendation." Rule 8(b), Rules Governing Section 2254 Cases.
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1 While Johnson objects to the magistrate judge's findings regarding his claims, he
2 makes no objection to her description of the procedural history in this case. *See generally*
3 Dkt. 23. Therefore, the Court will adopt the procedural history as it appears in the R&R.
4 Dkt. 23 at 2-3.

5 II. DISCUSSION

6 Johnson argues that the magistrate judge erred in concluding that his claims fail,
7 but his objections do not present new arguments. His objections amount to little more
8 than a "second bite" at theories that the magistrate judge has correctly analyzed and
9 rejected within the R&R. *Compare* Dkt. 22 *with* Dkt. 23. Because the Court agrees with
10 the magistrate judge's analysis and conclusions on these objections, the Court denies
11 relief on these issues.

12 A. Recall of the Mandate

13 In his first ground for relief, Johnson asserts that the Washington Court of
14 Appeals' denial of his motion to recall the mandate violated his right to exhaust state
15 remedies and his due process rights. In regard to Johnson's first claim, the magistrate
16 judge found that the appellate court's refusal to recall its mandate did not deny Johnson
17 his right to appeal, but only denied Johnson "an opportunity to pursue *discretionary*
18 review of the Court of Appeals' decision," which does not violate his constitutional
19 rights. Dkt. 22 at 17. Because Johnson was not denied a federal constitutional right when
20 the Washington Court of Appeals refused to recall its mandate, he is not entitled to
21 federal habeas relief on this claim and it should therefore be denied. *Id.*
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1 The Court agrees with the magistrate judge that Johnson's claim fails. Johnson
2 has not alleged facts that, if proven, would entitle him to relief. In his objection to the
3 R&R, Johnson does not address the fact that there is no constitutional guarantee to review
4 beyond the appellate level. *See generally* Dkt. 23. His first claim, therefore, fails.

5 **B. Record on Appeal**

6 In his second ground for habeas relief, Johnson asserts that he was denied his
7 constitutional right to a record of sufficient completeness to permit effective appellate
8 review. Johnson, however, fails to state with any particularity how any gaps in the
9 records have prevented him or his counsel from raising an issue, or how a more complete
10 transcript would have enhanced the fairness of the process. The magistrate judge
11 correctly notes that Johnson is only entitled to a sufficient record, not a perfect record.
12 Accordingly, his second claim fails.

13 **C. Ineffective Assistance of Appellate Counsel**

14 In his third ground for habeas relief, Johnson claims that his appellate counsel
15 provided ineffective assistance of counsel. Specifically, he argues that his attorney acted
16 unreasonably by failing to take steps to ensure a more complete record, by failing to
17 ensure that closing arguments were recorded, and by failing to remove a juror who had
18 sold the victim's house. However, Johnson fails to show prejudice from counsel's
19 allegedly deficient performance. Johnson's arguments have already been considered by
20 the magistrate judge, who recommended that the claim for habeas relief be denied. The
21 Court agrees with the magistrate judge's conclusion.
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1 **D. Fourth Habeas Claim – Ineffective Assistance of Trial Counsel**

2 Finally, Johnson claims that because the record was incomplete, he was denied
3 effective assistance of counsel. Johnson merely reiterates his belief that an incomplete
4 record prevented him from supporting his claims on appeal, without specifying any
5 particular reason as to how the state of the record prevented him from doing so.
6 Therefore, Johnson’s fourth and final claim is denied.

7 **E. Certificate of Appealability**

8 To obtain a certificate of appealability, a petitioner must make a substantial
9 showing of the denial of a constitutional right. A petitioner must also demonstrate that
10 reasonable jurists could debate whether, or agree that, the petition should have been
11 resolved in a different manner or that the issues presented were adequate to deserve
12 encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

13 In the instant case, the magistrate judge found that, under 28 U.S.C. § 2253(c)(3),
14 Johnson failed to make “a substantial showing of the denial of a constitutional right.” *Id.*
15 A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree
16 with the district court’s resolution of his constitutional claims or that jurists could
17 conclude the issues presented are adequate to deserve encouragement to proceed further.”
18 *Miller-El v. Cockrell*, 537 U.S. 322,327 (2003). the magistrate judge found that, under
19 this standard and based on a thorough review of the record and analysis of the law,
20 Johnson is not entitled to a certificate of appealability. Dkt. 22 at 36.

1 Having reviewed the record in this case, the Court finds that the determination that
2 Johnson's claims fail is not debatable among reasonable jurists. Therefore, the Court
3 declines to issue Johnson a certificate of appealability.

4 **III. ORDER**

5 The Court having considered the R&R, Johnson's objections, and the remaining
6 record, does hereby find and **ORDER** that:

- 7 (1) The R&R is **ADOPTED**;
- 8 (2) The action is **DISMISSED with prejudice**; and
- 9 (3) The Court **DECLINES** to grant Johnson a certificate of appealability.

10 Dated this 16th day of February, 2012.

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13 BENJAMIN H. SETTLE
United States District Judge